Supreme Court, U.S.
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In the

Supreme Court of the United States

JAY SHELDON FICHTNER,
Petitioner

v.

THE STATE OF TEXAS
Respondent

On Petition for Writ of Certiorari To
The Court of Criminal Appeals of Texas,
The Court of Appeals for the Fifth District of Texas
At Dallas and
The 194th judicial District Court of Texas at Dallas

PETITION FOR WRIT OF CERTIORARI

Rae Ann Fichtner, J.D., L.L.M.
Associate Adjunct Professor
Texas Woman's University
15625 Preston Rd., No. 1028
Dallas, Texas 75248-4851
Tel.: 972-404-9991
Fax: 972-404-9994

Attorney for Petitioner

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Questions Presented

1. In light of *U. S. v. Gaudin,* 115 S.Ct. 2310, did a trial court of Texas have subject matter, constitutional jurisdiction to try Petitioner on a charge of aggravated perjury under a Texas penal statute, which requires that the issue of *materiality,* an essential element of the offense, be determined as a matter of law by a court and not by a jury?

2. In a criminal trial of an aggravated perjury charge was Petitioner subjected to double jeopardy in violation the 6th amendment to the U. S. Constitution, when a trial court directed the jury that as a matter of law the acts charged in the indictment were *material,* and after the jury could not reach a verdict, the court declared a mistrial. Whereupon, the district attorney dismissed the indictment but obtained a re-indictment, and Petitioner was tried a second time under the same statute upon the same charges and facts.

3. Was Petitioner, who was appealing a criminal conviction, denied his constitutional due process right to appear and have a fair and open court hearing, have benefit of legal counsel, confront witnesses and register objections to the judgment, following an appellate court's decree that the original judgment of conviction on appeal was *void*, but thereafter, it accepted and approved the trial court's *ex parte* act of signing and filing with the appellate court a brand new judgment, without notice, following which the appeals court denied Petitioner's appeal, apparently using the new *ex parte* judgment in lieu of the void judgment from which Petitioner had taken an appeal?

4. Was Petitioner, who had been a practicing lawyer for over 40 years, wrongfully charged and prosecuted for aggravated perjury if he had represented, **upon information and belief**, to an appellate court that a copy of a proposed trial court order, which had been delivered to him by opposing counsel, was a true and correct copy of an order signed by the trial court, when he had not been notified in any manner that the court had made changes to the copy before signing it?

Parties to this Proceeding

The names of the parties to this proceeding are contained in the caption of the case. Petitioner is an individual. The Attorney General of the State of Texas will receive copies of this petition as required by the rules.

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Statement of Jurisdiction

1. The dates and nature of each opinion of which Petitioner seeks review are as follows:

a. Judgment of the 194th Judicial District Court of Dallas County, Texas, signed on March 12, 1999, in cause number F97-03659-KM, styled, *The State of Texas vs. Jay Sheldon. Fichtner.*

b. Judgment of the Court of Appeals for the Fifth District of Texas, sitting in Dallas, signed on September 21, 2000, in cause number 05-99-01053-CR, styled *Jay Sheldon. Fichtner v. The State of Texas.*

c. Judgment of the 194th Judicial District Court of Dallas County, Texas, signed on September 29, 2000, in cause number F97-03659-KM, styled, *The State of Texas vs. Jay Sheldon. Fichtner.*

d. Judgment of the Court of Appeals for the Fifth District of Texas, sitting in Dallas, signed on October 12, 2000, in cause number 05-99-01053-CR, styled *Jay Sheldon Fichtner v. The State of Texas.*

e. Judgment and unpublished opinion of the Court of Appeals for the Fifth District of Texas, sitting in Dallas, denying Petitioner's appeal, signed on April 5, 2001, in cause number 05-99-01053-CR, styled *Jay Sheldon Fichtner v. The State of Texas.*

f. Judgment of the Court of Appeals for the Fifth District of Texas, sitting in Dallas, denying Petitioner's motion for rehearing, signed on September 21, 2001, in cause number 05-99-01053-CR, styled *Jay S. Fichtner v. The State of Texas.*

g. Order of the Court of Criminal Appeals of Texas in case number 1129-01, styled *Jay Sheldon Fichtner v. State of Texas*, refusing *Appellant's Pro Se Petition for Discretionary Review* on November 21, 2001.

2. The court has jurisdiction of this petition for a writ of certiorari under 28 U.S.C. 1257(a), which is filed under Rule 11 of the *Rules of the Supreme Court of the United States* effective May 3, 1999.

Constitutional Provisions and Statutes Involved

U. S. Constitution, art. III, §2, and Amendment V.

No person shall be held to answer for a capital or otherwise infamous crime unless upon a presentment or indictment of a Grand Jury. . .nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . nor be deprived of life, liberty, or property, without due process of law. . .

U. S. Constitution, art. III, §2, and Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . .and be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Texas Code of Criminal Procedure, art. 1.12.

The right of trial by jury shall remain inviolate.

Texas Penal Code

§37.02 Perjury

(a) A person commits an offense if, with intent to deceive and with knowledge of the statement's meaning:

(1) he makes a false statement under oath or swears to the truth of a false statement previously made and the statement is required or authorized by law to be made under oath; or

(2) he makes a false unsworn declaration under Chapter 132, Civil Practice and Remedies Code.

(b) An offense under this section is a Class A misdemeanor.

§37.03 Aggravated Perjury

(a) A person commits an offense if he commits perjury as defined in Section 37.02, and the false statement:

(1) is made during or in connection with an official proceeding; and

(2) is material.

(b) An offense under this section is a felony of the third degree.

§37.04 Materiality

(a) A statement is material, regardless of the admissibility of the statement under the rules of evidence, if it could have affected the course or outcome of the official proceeding.

(b) It is no defense to prosecution under Section 37.03 (Aggravated Perjury) that the declarant mistakenly believed the statement to be immaterial.

(c) **Whether a statement is material in a given factual situation is a question of law** (Empasis added).

Statement of the Case

Petitioner was awarded an L.L.B. degree by the University of Pennsylvania Law School in 1951. He was admitted to the bar of the District of Columbia in 1952, State of New York in 1954 and State of Texas in 1955. Between March of 1955 and March 11, 1999, he had been in the continuous practice of civil law in Dallas, Texas.

On June 7, 1996, in behalf of a client Petitioner appeared in a Dallas trial court to contest an application for a Writ of Habeas Corpus by which a paternal grandparent was attempting to obtain visitation rights with the two young children of her deceased son and Petitioner's client. At the conclusion of the hearing the court ordered the client to produce the children for visitation and authorized issuance of a writ. The grandparent's attorney produced a proposed order for the court's signature and handed Petitioner a copy, whereupon Petitioner departed the courtroom late on Friday afternoon, June 7, 1996.

Upon review of the order the following week, Petitioner advised the client that in his opinion the order was fundamentally flawed. In order to retain custody and control of the children, the client authorized Petitioner to file an application for leave to file a Writ of Mandamus with the Dallas court of appeals, which was the Texas procedure at that time. Petitioner filed it within the week.

As part of Petitioner's application he attached an appendix of exhibits, which included the blank order as had been handed to him by the opposing attorney. Time was of the essence in the mandamus proceeding, so Petitioner inserted the date of June 7, 1996, and on the signature line he printed */s/ Bob O'Donnell*, the presiding judge. Having received no further communication from the other attorney, Petitioner made the completed order one of the exhibits of an appendix of exhibits, which accompanied the mandamus application. Petitioner did not verify the documents upon personal belief, but only upon information and belief.

The court of appeals denied the application for leave to file the petition for writ of mandamus on the date the documents were delivered to the court, so the petition was never filed by the court of appeals.

Petitioner for the first time learned that the flaws he had found in the document handed to him by the other attorney had been corrected by the trial court before he signed it, when Petitioner received notice of his indictment for aggravated perjury.

The opposing attorney filed a criminal complaint against Petitioner charging that Petitioner had committed perjury, when he moved the court of appeals for a writ of mandamus. In August 1996, the district attorney obtained an indictment against Petitioner for aggravated perjury.

Following the indictment but before a jury trial in 1997, citing the original decision in *State v. Rosenbaum*, 910 S.W.2d 934 (Tex.Crim.App. 1994), and §37.04, *Texas Penal Code*, Petitioner filed motions to obtain a pre-trial determination that the acts charged were not material, to quash the indictment and obtain a pretrial determination of materiality (App. 12, 13, 14). The motions were denied, and Petitioner filed objections to the court's charge, which directed the jury that the acts charged in the indictment were *material* (App. 15, 16). Even with the court's charge, the jury could not reach a verdict; it was discharged and a mistrial declared.

The district attorney then dismissed the indictment; the trial judge recused himself from the case; the district attorney obtained a re-indictment under a new case number, F97-03659-KM: and a visiting judge undertook the case (App. 26).

Before a second jury was convened, Petitioner filed additional motions, complaining of double jeopardy, reasserting a right to pre-trial determination of the element of *materiality*, and a lengthy motion to declare §37.04 of the *Texas Penal Code* unconstitutional, citing *U.S. v. Gaudin, supra* (App. 20). All motions were denied, and the case proceeded to trial.

When Petitioner was about to rest his case in defense, the state announced that it would call one of the two children of Petitioner's former client as a rebuttal witness. The 12 year old child, who by that time had been

living under the influence of the paternal grandmother in Oklahoma, was offered to testify that in 1995 Petitioner had offered her $20.00 to testify in the original, child-custody case that she had not been sexually molested by an older half-brother. Over strenuous objection, in a hearing outside the presence of the jury the court ordered that the jury could hear the testimony.

Petitioner's counsel feared that by injecting into Petitioner's aggravated perjury trial an issue of sexual abuse of the child would be devastatingly and unfairly prejudicial and that the jurors' minds would be poisoned so that Petitioner would not receive fair consideration of the evidence. They advised Petitioner to plead guilty to perjury under §37.02, *Texas Penal Code*, accept a year of probation, pay a $300 find and agree to the district attorney's demand to forfeit his Texas bar license.

Petitioner acceded to their advice and entered into a plea bargain agreement (App. 21) on March 11, 1999, and a judgment was signed on March 12, 1999.

Shortly thereafter, however, Petitioner timely filed a motion to retract his plea bargain agreement (App. 22) and to obtain a new trial (App. 23). When they were denied, he perfected an appeal of the March 12, 1999, judgment to the Court of Appeals for the Fifth District of Texas.

On September 21, 2000, after Petitioner and the state had filed briefs completed oral argument, the court of

appeals entered an order that the March 12, 1999, judgment was *void* (App. 4). However, instead of quashing the indictment or reversing the judgment and remanding the case to the trial court for further proceedings, it abated the appeal and instructed the trial judge to sign a new judgment and deliver it to the court of appeals by October 9, 2000 (App. 4).

On October 4, 2000, Petitioner filed a motion to disqualify the judge from signing any further judgments (App. 25) and a motion for judgment, which contained a specific allegation that the Texas *perjury statute. . .in so far as it requires the trial court to determine. . ."materiality" as a matter of law, is unconstitutional. . .*[and] [b]ecause the court charged the jury as to "materiality" in the first jury trial, Defendant has been subjected to double jeopardy (App. 25). Petitioner's motions were ignored, and without notice to Petitioner the trial judge on September 29th signed a new judgment, even though the case had been on appeal for more than a year. Parenthetically, the judgment signed on September 29, 2000, is dated March 12, 1999, the date of the original judgment. Also, it refers to attached conditions of probation, but there are no attachments to the document (App. 6).

In an unpublished opinion of April 5, 2001, the court of appeals denied Petitioner's appeal (App. 2).

Petitioner filed a timely petition to the Texas Court of Criminal Appeals for discretionary review of the lower courts' judgments, which it denied on November 21, 2001.

The Texas Court of Criminal Appeals does not sign a formal order, but issues an official, postcard notice, which is attached as Appendix 1.

Reasons for Granting Writ

The State of Texas in prosecution of aggravated perjury charges is ignoring a defendant's right to have a jury consider all elements of the offense, which is in direct contradiction to the Supreme Court's opinion in *U.S. v. Gaudin*, 115 S.Ct. 2310 (1995). Petitioner and other Texas defendant are confronted with inconsistent potential remedies and rights. Subjectively, one court may exercise its discretion and allow a jury to decide the question of materiality, and another may decide the question as a matter of law following a trial full trial. In one instance the court appears to violate the statutory proscription of §37.04, *Texas Penal Code*, and the other it appears to be in direct conflict with this court's holding in *Gaudin*. Under either scenario not only is a defendant faced with a dilemma, but the courts are also. In any event judicial economy suffers.

Honorable Harold Entz, the trial judge who in 1997 in the instant case charged the jury that as a matter of law the acts with which Petitioner were charged were material, did so with great reluctance, which he verbalized. Witness his statement to Petitioner, his counsel and the state's attorneys before charging the jury:

And, therefore, with great reluctance I find on the charge 02329 [aggravated perjury] *obligated to present to the jury the last paragraph on one. Though my judicial feelings being such that it is a comment on the weight of the evidence gives me great trouble in having to charge as such. However, in light of Rosenbaum* [cited infra] *and other authorities, I find no way out of my personal dilemma in this regard. If this matter is brought to some appellate tribunal in the future, I would welcome appellant judicial guidance for me, personally, and the other members of the trial bench and bar in this regard* (App. 15).

And what about a defendant? How does it know the standards to which it will be subjected, and does it know how to prepare an adequate defense to charges? The Texas bench and bar require an answer Judge Entz's and Petitioner's dilemma.

State courts should not be allowed to ignore basic due process rights of individuals, as happened to Petitioner, who together with his wife and children, has suffered shame, humiliation, loss of reputation and extraordinary financial loss for an innocent, unknowing mistake, but he did not commit a criminal act. Petitioner may have been over-zealous, but he was acting diligently on behalf of a client, who ultimately lost her children when Petitioner had to withdraw his representation.

The jurisdiction of courts of appeals to enter interim or interlocutory orders should be further defined in light of the appellate court's action in the instant case. Rather than decide an appeal, it ordered a trial court, which had

lost jurisdiction because of a pending appeal, to enter a brand new order, which it accepted without requiring adequate constitutional safeguards for the defendant. In following orders the appellate court had given to him, without consulting with or allowing Petitioner an opportunity to be heard, appears to have taken the original, void order, obliterate portions of it, overlooked other portions, and signed a new document. In the instant case the court of appeals gave no consideration to protection of Petitioner's fundamental right as a criminal defendant to be apprized of charges and to appear and contest a court's ruling. It ignored Petitioner's retraction of his plea bargain agreement and his motion for new trial. It ignored the trial court's lack of jurisdiction since the appeal had been pending over a year, and it ordered that court to submit to it a new judgment, without providing any remedy to Petitioner.

Argument in Response to First Question Presented

In *United States v. Gaudin*, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), the court held that *The Fifth and Sixth Amendments require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime* (at 2311). A federal court had determined the element of *materiality* as a matter of law and withheld the issue from a jury, and the Supreme Court reversed. *See, also, U. S. v. David*, 83 F.3d 638 (4th Cir. 1996), which overturned a jury verdict, because a trial court had decided the issue of *materiality* over the defendant's 5th and 6th amendment objections. *See also, Sullivan v. Louisiana*, 113

S.Ct. 2078, 124 L.Ed.2d 182 (1993) [a constitutionally deficient "reasonable doubt" instruction was not subject to an harmless error analysis]. *U.S. v. DiRico*, 78 F.3d 732 (1st Cir. 1996) holds that the failure to submit the question of materiality is a structural defect that required reversal of a jury conviction.

Texas courts continue the practice of determining the *materiality* element of perjury as a question of law, but the Texas Court of Criminal Appeals has prohibited a trial court from making an early determination of the issue and requires that a defendant await completion of a jury trial before a court may issue its ruling. *State v. Rosenbaum*, 910 S.W.2d 934 (Tex.Crim.App. 1994). The Texas legislature has yet to amend §37.04(c), *Texas Penal Code*, which provides that in aggravated perjury prosecutions the essential issue of *Whether a statement is material in a given factual situation is a question of law.* Petitioner submits such provision directly contradicts a defendant's right under the Sixth Amendment to have all material elements of a crime determined by a jury, as interpreted by the Supreme Court in *Gaudin*.

The supreme court of the State of Kansas in *State v. Rollins*,957 P.2d 438 (Sup. Ct. 1998) also stands in contradiction to the U. S. Supreme Court. It has authored a confusing and questionable opinion that *materiality* is not an element of the crime of perjury, [and] *it need not be submitted to a jury* (at 444). It essentially rejects the U. S. Supreme Court decision in *Gaudin*, the effect of the Sixth Amendment to the U. S. Constitution and almost

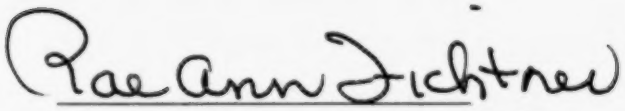
challenges the U. S. Supreme Court to override Kansas legislation though contrary by the U. S. Constitution: *In our federal system, the United States Supreme Court is free to interpret federal statutes as it did in Gaudin. Similarly, Kansas courts are charged with the interpretation of Kansas statutes* (at 444).

CONCLUSION

Petitioner prays that this court grant a Petition for Writ of Certiorari to review judgments of the courts of the State of Texas and upon such review reverse and render judgment that such judgments conflict with this court's holding in *U. S. v. Gaudin* that materiality as an element of the offense of perjury must be determined by a jury for Petitioner; that Petitioner's constitutionally protected right to due process of law was violated, when an appellate court after finding that Petitioner's judgment of conviction was void, approved a trial court's *ex parte* creation of a new judgment of conviction, which the appellate court then substituted for the judgment which Petitioner had appealed; that an attorney may not be guilty of perjury by verifying upon information and belief that a document had been signed by a trial judge; in the alternative reverse and remand the case for further trial proceedings.

Respectfully submitted,

/s/Rae Ann Fichtner



Rae Ann Fichtner, J.D., L.L.M.
Associate Adjunct Professor
Texas Woman's University
15625 Preston Rd., No. 1028
Dallas, Texas 75248-4851
Tel.: 972-404-9991
Fax: 972-404-9994

Attorney for Petitioner